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No. 84-9

In the Supreme Court
OF THE
United States

October Term, 1984

Massachusetts Mutual Life Insurance Company,
and Cecilia Stevenson,
Petitioners,
vs.
Doris Russell,
Respondent.

BRIEF OF 35 MULTI-EMPLOYER TRUST FUNDS AS AMICI CURIAE SUPPORTING REVERSAL

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QUESTION PRESENTED

Whether, under the Employee Retirement Income Security Act, a fiduciary to an employee benefit plan may be held personally liable to a plan participant or beneficiary for punitive damages for improper or untimely processing of benefit claims?

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MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,
and CECILIA STEVENSON,
Petitioners,

vs.

DORIS RUSSELL,
Respondent.

BRIEF OF AMICI CURIAE SUPPORTING REVERSAL

Now come the Amici Curiae, Construction Laborers Pension Trust for Southern California, Laborers Health & Welfare Trust for Southern California, Construction Laborers Vacation Trust for Southern California Laborers Training and Retraining Trust for Southern California, California Field Ironworkers Pension Trust, California Field Ironworkers Welfare Plan, Carpenters Pension Trust for Southern California, Carpenters Health & Welfare Trust for Southern California, 11 County Carpenters Vacation Savings and Holiday Plan, Southern California Provision Industry Health & Welfare Trust Fund, Butchers and Provision Workers Pension Fund of Southern California, Joint Council of Teamsters No. 42 Welfare Trust Fund, Teamsters and Food Employers Security Trust Fund, Southern California United Food and Commercial Workers Unions and Food Employers Benefit Fund, Southern California United Food and Commercial Workers Unions and Food

Employers Supplementary Unemployment and Supplementary Disability Benefit Fund, Southern California United Food and Commercial Workers Unions and Food Employers Joint Pension Trust Fund, U.F.C.W. Local 711 and Retail Food Employers Benefit Fund, Retail Food Employers and U.F.C.W. Local 711 Pension Trust Fund, Retail Food Employers and Meatcutters Local 457 Benefit Fund, Food Employers and Bakery and Confectionery Workers Benefit Fund of Southern California, Valley Clerks Health & Welfare Trust Fund, Northern California Retail and Food Clerks Unions and Food Employers Joint Pension Trust Fund, Northern California Retail Clerks Unions-Employers Vacation Fund, Northern California Retail Clerks Union and Food Employers Supplementary Payment Fund, Northern California Food Employers and Retail Clerks Unions Benefit Fund, Retail Clerks Specialty Stores Pension Fund, Northern California Area Retail Clerks Unions-Employers Welfare Fund, Northern California Pharmacists, Clerks and Drug Employers Pension Fund, Northern California Registered Pharmacists Pension Fund, Southern California Meatcutters Unions and Food Employers Benefit Trust Fund, Southern California Meatcutters Unions and Employers Pension Fund, Gemco-Retail Clerks Unions Pension Fund, Gemco-Retail Clerks Unions Welfare Trust, California Butchers Pension Trust Fund, and Northern California Butchers Unions and Employers Health Trust Fund (the "Trust Funds") and submit this brief in support of reversal in USSC No. 84-9, pursuant to Rule 36.2.

The written consents of the parties has previously been filed with the Clerk of the Court.

I.

INTEREST OF THE AMICI CURIAE

1. The Trust Funds are multiemployer trust funds established pursuant to the provisions of Section 302(c) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. Section 186(c). All of the Trust Funds are employee benefit funds within the meaning of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. 1001, *et seq.*, and are subject to federal regulation pursuant to the provisions of ERISA.

2. There are over two hundred fifty thousand participants in the Trust Funds; annually, over $40,000,000.00 is contributed to the Trust Funds on behalf of these participants.

3. Each of the Trust Funds is administered by a board of trustees; the trustees, who serve without compensation, are "fiduciaries" within the meaning of ERISA, 29 U.S.C. Section 1002(21)(A). The trustees of each Trust Fund are charged with the responsibility of administering the benefit plans promulgated by the Trust Funds in a manner consistent with the terms of such plans and in compliance with ERISA and other applicable provisions of federal law. The trustees of the Trust Funds annually process thousands of benefit claims.

4. The Trust Funds believe that the Ninth Circuit's holding in *Russell* that punitive damages may be awarded against the trustees of ERISA-regulated trust funds for failure to properly process benefit claims is incorrect as a matter of law, and should be reversed by this Court.[1] They further believe that the practical effect of the

[1] *Russell* involved two single-employer employee benefit plans. But the across-the-board rule announced by the Ninth Circuit regarding liability for punitive damages would apply to fiduciaries of multiemployer trust funds, as well.

holding of the Ninth Circuit in *Russell* will be to discourage all responsible individuals from serving as trustees of ERISA-regulated benefit plans, because such service would expose them to liability for punitive damages for which they may not obtain insurance and for which, in some circumstances, they may not seek reimbursement from the trust funds. The Trust Funds further believe that the ultimate impact of the Ninth Circuit's decision will be to undermine the financial stability of ERISA-regulated trust funds, in ways described in detail in the accompanying brief.

5. These amici curiae are in a unique position to advise the Court with regard to the implications of the *Russell* decision, because of their intimate familiarity with the role of fiduciaries in the handling of employee benefit claims in ERISA-regulated employee benefit trust funds.

II.

SUMMARY OF ARGUMENT

1. As a matter of statutory construction, the U.S. Court of Appeals for the Ninth Circuit erred in concluding that punitive damages may be sought by claimants who allege that the trustees of employees benefit plans improperly processed their benefit claims.

a. Neither the text of ERISA nor its legislative history supports the conclusion that punitive damages may be awarded in such cases.

b. As a matter of public policy, the courts should not engraft a right to punitive damages on the existing statutory scheme, which provides full relief to all claimants.

c. The traditional rationales which support the award of punitive damages in non-ERISA actions are absent in cases brought by claimants against employee benefit plans seeking relief under sections 502 and 409 of ERISA.

2. Considerations of public policy overwhelmingly militate against the award of punitive damages in cases seeking relief under sections 502 and 409 of ERISA.

a. As a practical matter, no responsible individual will agree to act as a trustee of an employee benefit plan if the *Russell* decision is upheld. Such trustees receive no compensation for their service, but they would nevertheless be exposed to liability for punitive damages; in most jurisdictions, they will be unable to obtain insurance to protect themselves against direct liability for such damages. Actively discouraging the participation of capable people as trustees of employee benefit plans runs counter to the principal purpose of ERISA, which was to insure responsible fiduciary administration of such plans.

b. Although trustees of employee benefit plans may, in certain limited circumstances, be able to obtain indemnification from their funds against punitive damage claims, the cost of defending such claims will be a significant drain on the resources of the plans. Both ERISA and the subsequent Multi-employer Pension Plan Amendments Act of 1980 were enacted, in large part, because of Congress' recognition that employee benefit plans already have severe financial difficulties.

c. Because punitive damages are an open-ended type of remedy, and because the *Russell* decision invites each benefit claimant to "tack on" a claim for punitive damages in every suit filed against an employee benefit trust, the liability of the trustees will become immeasurable.

III.

ARGUMENT

A. As a Matter of Statutory Construction, the Ninth Circuit Erred in Holding That Punitive Damages are Recoverable Under Sections 409 and 502 of ERISA.

1. The Plain Language of the Statutes and the Legislative History Do Not Support the Inference that Punitive Damages are Available.

As this Court has repeatedly held, the starting point for construing federal statutes is always the statutory language itself; *see, e.g., Ernst and Ernst v. Hochfelder,* 425 U.S. 185, 197 (1976); *International Brotherhood of Teamsters v. Daniel,* 439 U.S. 551, 558 (1979). In its opinion in *Russell,* the Ninth Circuit quotes portions of Sections 409 and 502 of ERISA, but does not attempt to parse the statutes to determine whether, by their literal terms, they afford a basis for awarding punitive damages. 722 F.2d at 490-491.[2]

The *Russell* opinion notes that Section 409(a) provides that a fiduciary "shall be subject to such . . . equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary,[3] and that Section 502(a)(2) permits the Secretary of Labor, or a participant,

[2]The discussion of punitive damages in the *Russell* opinion does not specify precisely which provisions of ERISA the court believes would support a claim for punitive damages; *Russell, supra,* 722 F.2d at 490-492. The cases cited in the discussion in *Russell* refer to Sections 409, 410 and various portions of Section 502 of ERISA. The failure to specify the statutory source of the right to claim punitive damages makes the court's analysis all the more puzzling.

[3]As Petitioner notes, the language of Section 409 of ERISA indicates that the rights provided therein are bestowed upon the benefit plan itself, not upon individual beneficiaries. (See Petition p. 9).

beneficiary or fiduciary to seek "appropriate relief under Section 1109 of this title." 722 F.2d at 488.

Neither of these statutory provisions contain any language which would suggest that Congress thought that punitive damages would be a form of "appropriate relief."

To justify its conclusion that punitive damages should be available as a remedy for ERISA violations, the Ninth Circuit's opinion notes that the Senate and House Committee reports on ERISA show that the Act was intended to provide "the full range of legal and equitable remedies available in both state and federal courts.[4] But the language quoted by the Court begs the question of what the "range" of remedies ought to be in an action such as *Russell.*[5] Suits by beneficiaries of employee benefit plans are fundamentally actions in contract. The accepted rule is that actions for breach of contract do not give rise to claims for punitive damages. *See Restatement (2nd) of Contracts,* Section 369 (Tentative Draft no. 14, March, 1979).

[4]722 F.2d at 491, citing H.R. Rep. No. 93-533, 93d Cong., 1st Sess. 17, reprinted in 1974 U.S. Code Cong. and Ad. News, 4639, 4655, Sen. Rep. No. 93-127, 93d Cong., 1st Sess. 35, reprinted in 1974 U.S. Code Cong. and Ad. News, 4838, 4871.

[5]The *Russell* opinion points to the reference to "sanctions" in Section 1 of ERISA, 29 U.S.C. Section 1001(b), as evidence of Congress' intent to provide for the imposition of punitive damages against fiduciaries. But ERISA contains its *own* "sanctions," including removal of fiduciaries (Section 409(a)), restitution (*Id.*) and monetary fines (Sections 501 and 502(c)). There is no reason to suppose that Congress intended fiduciaries to be subject to "sanctions" *in addition* to those explicitly set forth in ERISA. *Cf. Green v. Wolf Corporation,* 406 F.2d 291, 303 (2d Cir. 1968) [punitive damages not recoverable for a violation of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78(j)(b) since, *inter alia,* "the Securities Exchange Act of 1934 contains provisions imposing criminal penalties on violators"].

Moreover, Section 502(a)(3) of ERISA, 29 U.S.C. Section 1132(a)(3), contains language suggesting that Congress intended disappointed benefit claimants to be limited to equitable and injunctive relief.[6] Section 502(a)(3) authorizes a beneficiary to bring an action "to enjoin any act or practice which violates any provision of this sub-chapter or the terms of the plan or (B) to obtain *other appropriate equitable* relief (i) to redress such violations or (ii) to enforce any provisions of this sub-chapter or the terms of the plan . . ." [Emphasis supplied]. Courts which have considered the issue have concluded that suits by beneficiaries under Section 503(a)(1)(B) and 503(a)(3) to obtain plan benefits are equitable, rather than legal, in nature; *see e.g., Wardle v. Central States, Southeast and Southwest Areas Pension Fund,* 627 F.2d 820, 829 (7th Cir. 1980), *cert. denied,* 499 U.S. 1112 (1981) ["We conclude that Congress' silence on the jury right issue reflects an intention that suits for pension benefits by disappointed applicants are equitable." 627 F.2d at 829]. Punitive damages are almost universally considered to be a form of legal, rather than equitable, relief. *See, e.g., Walker v. Ford Motor Co.,* 684 F.2d 1355 (11th Cir. 1982).

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[6]Participants and beneficiaries of multiemployer benefit plans may also have a cause of action under 301 of the Labor Management Relations Act of 1947, as amended 29 U.S.C. Section 185(a), when plan benefits are wrongfully denied. *See, e.g., Rehmar v. Smith,* 555 F.2d 1362 (9th Cir. 1976). In such cases, the instrument creating the multiemployer benefit trust is, itself, a form of collective bargaining agreement. Many lower courts have held that actions under Section 301 do not give rise to a claim for punitive damages; *see, e.g., Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO v. Michaelson's Food Services, Inc.,* 545 F.2d 1248, 1254 (9th Cir. 1976); *Badon v. General Motors Corporation,* 679 F.2d 93 (6th Cir. 1982); *Sanabria v. International Longshoremen's Association Local 1575,* 597 F.2d 312, 314 (1st Cir. 1979).

An analogous statutory construction has been made by the courts in interpreting Section 706(g) of the Civil Rights Act of 1964, 42 U.S.C. Section 2000(e) - 5(g). That statute provides that a court, upon a finding of liability, may "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without backpay . . . or any other equitable relief as the court deems appropriate." The courts have held, with near unanimity, that this language does not authorize the award of punitive damages; *see Shah v. Mt. Zion Hospital and Medical Center,* 642 F.2d 268, 272 (9th Cir. 1981); *DeGrace v. Rumsfeld,* 614 F.2d 796, 808 (1st Cir. 1980); *Harrington v. Vandalia-Butler Board of Education,* 585 F.2d 192, 194 (6th Cir. 1978), *cert. denied,* 441 U.S. 392 (1979); *Pearson v. Western Electric Co.,* 542 F.2d 1150 (10th Cir. 1976). *See also Pfeiffer v. Essex Wire Corp.,* 682 F.2d 684 (7th Cir.), *cert. denied,* 459 U.S. 1039 (1982) [no punitive damages awardable under Age Discrimination in Employment Act.] By parity of reasoning, punitive damages also should not be available under the similar provisions of Section 502 of ERISA.

2. The Court Should Not Engraft A Right to Punitive Damages Onto The Existing Statutory Scheme.

The Ninth Circuit's decision in *Russell* ignores this Court's repeated warnings to lower courts not to gratuitously expand detailed statutory remedial schemes. The remedial scheme set forth in ERISA is complex and extensive; there is simply no basis for the assumption that Congress intended the courts to add additional remedies:

> "The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement."

Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77, 97 (1981).

See also Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 19:

> "It is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it."

Amici have searched the legislative history in vain for any indication that Congress expected punitive damages would be awardable under Section 502. So far as amici can ascertain, there are no statements in the record which directly authorize such damages. ERISA is not an act which was drafted in haste; *see generally* Legislative History of The Employee Retirement Income Security Act of 1974 (Committee print compiled by the Senate Committee on Labor and Public Welfare). It is highly improbable that Congress intended the extraordinary remedy of punitive damages to be available to disappointed benefit claimants bringing suit under Section 502, but simply "forgot" to mention it in both the statute and its legislative history.

3. The Absence of a Rationale for Punitive Damages.

When ambiguity exists with regard to whether punitive damages may be awarded, this Court has frequently looked to considerations of public policy to determine whether such damages are available. *See, e.g., Smith v. Wade*, ____ U.S. ____, 103 S.Ct. 1625 (1983); *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42 (1979); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981). The Ninth Circuit's decision in *Russell* betrays no serious effort to balance the competing policy considerations which are traditionally weighed in determining whether punitive damages should be permitted.

Moreover, none of the traditional public policy rationales for permitting punitive damages would appear to apply to claims by beneficiaries under Section 502 of ERISA.

This Court has often stated that punitive damages are designed to punish and deter outrageous conduct. *Smith v. v. Wade*, ____ U.S. ____, ____, 103 S.Ct. 1625, 1636 (1983). It is extremely difficult to ascertain how "punishment" of fiduciaries will further any legitimate purpose of ERISA. As already noted, the trustees of multiemployer plans serve without compensation;[7] they derive no material benefit from the grant or denial of any benefit claim by a trust fund participant. In such a context, it is difficult to imagine that a trustee would engage in "outrageous" conduct. If the trustee fails to perform his obligations in a timely manner, or according to the trust provisions, injunctive relief may be obtained from a federal court to compel him to do so. *See* ERISA Section 502(a)(3). If the trustee's conduct constitutes a breach of fiduciary duty, he may be permanently removed. *See* ERISA Section 409. In these circumstances, the traditional concepts of "punishment" and "deterrence" would appear to have little utility. A trustee's dereliction of an ERISA imposed duty entitles a trust participant to prompt and effective injunctive and equitable judicial relief.

A second policy rationale for the imposition of punitive damage awards arises in cases where the defendant may derive great profit from outrageous conduct. *See, e.g., Toole v. Richardson-Merrell, Inc.*, 251 Cal.App.2d 689, 698 (1967). In such circumstances, the courts reason, the defendant may find it financially attractive to run the risk of paying mere general damages for wrongful conduct, since such damages will be small in comparison to the profits such conduct generates. In these circumstances, punitive

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[7]ERISA Section 408(c)(2), 29 U.S.C. Section 1108(c)(2).

damages may be the only effective tool for curtailing such actions. But no such considertaion is present here. The trustees do not profit from the grant or denial of individual benefit claims, and have no prospect of realizing any financial gain, great or small, from administration of an employee benefit plan.

Several states recognize a third public policy rationale for the award of puntive damages. In such jurisdictions, punitive damages may be granted because the "American rule" generally precludes successful plaintiffs from recovering attorneys' fees. *See,* Ghiardi and Kircher, *Punitive Damages,* § 2.11 (Callaghan 1983). That consideration is not present in suits brought under Section 502 of ERISA, since federal courts will have the discretion to award attorneys' fees to a successful claimant in appropriate cases. ERISA Section 502(g)(1), 29 U.S.C. Section 1132(g)(1).

The *Russell* opinion implies that federal courts might "borrow" principles of state law in evaluating punitive damage claims under Section 502 of ERISA. 722 F.2d at 491-492. The difficulty with this approach is that the state courts are in wide disagreement over the availability of punitive damages. Some states, such as Connecticut and Michigan, appear to view punitive damages as compensatory in nature; *see, e.g., Collend v. New Canaan Water Co.,* 155 Conn. 477 (1967) [Connecticut law]; *National Semiconductor v. Allendale Mutual Insurance Co.,* 549 F.Supp. 1195 (D.Conn. 1982) [same]; *Willett v. Ford Motor Co.,* 400 Mich. 65 (1977) [Michigan law]; *Postill v. Booth Newspapers, Inc.,* 118 Mich.App. 608 (1982) [same]. Other states, such as California, view punitive damages as a means of punishment and deterrence of future misconduct; *see, e.g.,* California Civil Code Section 3294. Still other states, such as Massachusetts and Louisiana, do not permit an award of punitive damages at all, except in narrow categories of cases where they are specifically authorized by

statute, *see, e.g., Schiller v. Strangis,* 540 F.Supp. 605 (D. Mass. 1982) [Massachusetts law]; *Ashland Oil, Inc. v. Miller Oil Purchasing Co.,* 678 F.2d 1293 (5th Cir. 1982) [Louisiana law].

To the extent that the *Russell* opinion suggests that state law doctrines may furnish guidance on the awardability of punitive damages, it invites federal courts to thread their way through a maze of hopelessly inconsistent and conflicting state doctrines. Such a course is grossly inconsistent with Congress' desire to provide for uniformity in the administration of ERISA-regulated trust funds.

B. As a Matter of Public Policy, Punitive Damages Should Not be Recoverable for ERISA Violations.

Amici have already noted the conspicuous absence of any legislative history which would countenance the recovery of punitive damages against fiduciaries for ERISA violations. In addition, there are positive considerations of public policy which militate against the availability of such damages. The following is the brief discussion of salient considerations:

1. **Impact on Trustee Service.**

The most dramatic and obvious result of the Ninth Circuit's decision in *Russell* will be to cause responsible individuals to refuse to serve as trustees of employee benefit plans. The possibility of being personally liable for paying punitive damage awards without predictable limits is enough to discourage any prudent individual from agreeing to serve as a trustee of an employee benefit plan.[5]

[5]Permitting disappointed benefit claimants to seek punitive damages against fiduciaries of employee benefit trusts also raises the specter of claims founded on theories of vicarious liability. In large employee benefit trust funds, much of the day-to-day claims administration work is performed by nonfiduciary employees, who are

In many jurisdictions, it appears that the trustees could not obtain any insurance which would protect them from a punitive damage award. As a matter of public policy, the states of California, Illinois, Missouri, New York, New Jersey, Florida, Virginia and Colorado forbid defendants from obtaining insurance reimbursement for sums awarded as punitive damages. *See, e.g., Northwestern National Insurance Co. v. McNulty,* 307 F.2d 432 (5th Cir. 1962) [applying Florida and Virginia law]; *Hartford Accident and Indemnity Co. v. U.S. Concrete Pipe Co.,* 369 So.2d 451 (Fla.App. 1979) [Florida law]; *City Products Corp. v. Globe Indemnity Co.,* 88 Cal.App.3d 31 (1979) [California law]; *Ford Motor Co. v. Home Insurance Co.,* 116 Cal.App.3d 374 (1981) [same]; *Hartford Accident and Indemnity Co. v. Village of Hempstead,* 48 N.Y.2d 218, (1979) [New York law]; *Brown v. Western Casualty and Surety Co.,* 484 P.2d 1252 (Colo.App. 1971) [Colorado law]; *Crull v. Gleb,* 382 S.W.2d 17 (Mo.App. 1964) [Missouri law]; *Variety Farms v. New Jersey Manufacturers Insurance Co.,* 172 N.J.Super. 10, 410 A.2d 696 (1980) [New Jersey law]; *Beaver v. Country Mutual Insurance Co.,* 95 Ill.App.3d 1122, 420 N.E.2d 1058 (1981) [Illinois law].

Given the possibility that service as a trustee might result in a punitive damage award for which the trustee would have no protection, it taxes the imagination to envision any intelligent individual accepting such a position, especially in view of the fact that the trustees receive no compensation for their services.

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supervised by and report to the plan's fiduciaries. As a practical matter, the plan fiduciaries cannot review every minute detail of plan administration carried out by such staff personnel. Yet the rule of *Russell* would suggest that plan fiduciaries may be sued by disappointed benefit claimants who are displeased with the way in which staff members have processed their claims. Such "vicarious liability" claims have met with harsh criticism from legal commentators; *see, e.g.,* Prosser, *Torts,* (4th Ed.), p. 12.

2. Impact on Costs of Administration.

As the Ninth Circuit opinion in *Russell* notes, trustees have limited rights to indemnification under section 410 of ERISA, 29 U.S.C. Section 1110. The principal mechanism which Section 410 permits employee benefit plans to utilize to protect fiduciaries is the purchase of insurance. As discussed above, in many jurisdictions insurance is not available to cover claims for punitive damages. But even if one were to assume that Section 410 would permit employee benefit plans to fully protect their trustees, the result would be far from desirable. Such protection would be an extra cost to the plan, and thus a drain on plan resources. One of the principal purposes of ERISA was to strengthen the financial underpinning of employee benefit plans; *see, e.g., Nachman v. Pension Benefit Guaranty Corporation,* 446 U.S. 395, (1980); *Oregon-Washington Carpenters Pension Trust v. R.A. Gray & Co.,* ____ U.S. ____, ____, 104 S.Ct. 2709, 2713-2715 (1984). It is surely contrary to the purpose of ERISA to saddle employee benefit plans with open-ended liabilities which go beyond making an employee whole. Providing adequate protection against punitive damage claims, either through the purchase of insurance or through direct indemnification of fiduciaries, is certain to significantly increase the costs of administering employee benefit plans, in contravention of ERISA's clear intent.[9]

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[9]In *City of Newport v. Fact Concerts, Inc.,* 453 U.S. 247, 267, this court stated that "an award of punitive damages against a municipality 'punishes' only the taxpayers, who took no part in the commission of the tort." By the same token, an award of punitive damages against the fiduciaries of a trust fund really "punishes" only the participants because (1) responsible individuals will not be willing to serve as fiduciaries unless they are insured or indemnified against punitive damage awards; and (2) if the trust must indemnify the trustees against punitive damages, or purchase insurance for them, the cost is ultimately borne by the trust beneficiaries themselves.

Furthermore, if punitive damages are permitted, fiduciaries may be forced to defend themselves against a string of *seriatim* punitive damage claims brought by individual participants, each complaining of the same incident of misconduct. Several circuit courts have noted that such potential multiple punitive damage recoveries can be financially ruinous to a defendant; *see, e.g., de Haas v. Empire Petroleum Company,* 435 F.2d 1223, 1231 (10th Cir. 1971); *Globus v. Law Research Service, Inc.,* 418 F.2d 1276, 1285 (2d Cir. 1969); *Roginsky v. Richardson-Merrell, Inc.,* 378 F.2d 832 (2nd Cir. 1967).

Finally, if trustees of multiemployer funds are potentially liable for punitive damages for mishandling of benefit claims, the substantial *in terrorem* effect of such exposure will have a deleterious effect on the administration of ERISA-regulated employee benefit plans.[10] Many unmeritorious claims may be paid in full or settled, simply to avoid the exposure to open-ended liability for punitive damages.

3. The Unlimited Nature of Punitive Damage Liability.

The authorities appear to be in universal agreement that the grant of a punitive damage award is a discretionary act of the trier of fact; *see, e.g., Neal v. Farmers Insurance Exchange,* 21 Cal.3d 910 (1978); Prosser, *Torts,*

[10]In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) this court held that punitive damages could not be awarded against a publisher of a defamatory article because "jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship . . ." The award of punitive damages against the trustees of the employee benefit plans will have the same "chilling" effect on their efficient administration of such plans.

(4th ed.) Section 2, pp. 13-14; *Central Microfilm Service v. Basic/Four Corporation,* 688 F.2d 1206 (8th Cir. 1982).[11]

Because of the wide discretion which the trier of fact enjoys in setting an award of punitive damage, there is no practical way accurately to determine, in advance of trial, the extent of a defendant's exposure to such an award.[12]

The Ninth Circuit has attempted to limit the circumstances in which such an award will be available by stating that punitive damages may only be recovered where there is "a showing that the fiduciary, in carrying out its duties and responsibilities under the Act, acted with actual malice or wanton indifference to the rights of a participant or beneficiary." 722 F.2d at 492. But terms such as "wanton indifference" are so nebulous that the trier of fact is given nearly unlimited range in determining whether to award such damages.

[11]The Second Circuit has referred to "huge and perhaps capricious punitive damages which some juries have awarded." *Green v. Wolf Corporation,* 406 F.2d 291, 303 (1968).

[12]As this Court has noted, "In most jurisdictions jury discretion over the amounts awarded [as punitive damages] is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused." *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 350 (1974). Commentators have also noted the lack of uniform standards for the award of punitive damages: "The law of punitive damages is characterized by a high degree of uncertainty that stems from the use of a multiplicity of vague, overlapping terms." *Ellis, Fairness and Efficiency in the Law of Punitive Damages,* 56 So.Cal.L.Rev. 1, 52-53 (1982).

Other courts have met with little success in attempting to crystallize the standards to be employed in determining whether punitive damages should be assessed.[13]

Finally, this Court has noted that, in the absence of some compelling purpose, punitive damages are merely a "windfall" to a fully compensated plaintiff; *see City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981). The Court's characterization of punitive damages in *City of Newport* applies with full force to the issue presented by the Petition in this case. Section 502 of ERISA provides ample make-whole remedies to trust fund beneficiaries; any "smart money" they obtain through punitive damage awards is a bonus at the expense of the trust fund, its fiduciaries, and the fund's other beneficiaries.

The absence of clear standards for the award of punitive damages adds a undesirable burden to those already shouldered by trust fiduciaries, with no clear benefit in exchange.

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[13]This Court has recently taken note of the diverse range of touchstone phrases used by lower courts to analyze punitive damage claims, and stated that the variation in standards "was exacerbated by the ambiguity and slipperiness of such common terms as 'malice' and 'gross negligence'" *Smith v. Wade*, ___ U.S. ___, ___, 103 S.Ct. 1625, 1631 (1983). *See, e.g., Schwartz v. Sears, Roebuck & Co.*, 669 F.2d 1091 (5th Cir. 1982) [punitive damages justified where there was an "entire want of care which would raise the belief that the act or omission complained of was the result or consequence of indifference to the right or welfare of the person or persons affected by it."]; *Silberg v. California Life Insurance Co.*, 11 Cal.3d 452 (1974) [to be liable for punitive damages, the defendant "must act with the intent to vex, injure or annoy, or with a consequent disregard of the plaintiff's rights"]; *Anderson v. Continental Insurance Co.*, 85 Wis.2d 675, 271 N.W.2d 368 (1978) [punitive damages available "only where the wrong was inflicted under circumstances of aggravation, insult or cruelty, with vindictiveness or malice."].

IV.

CONCLUSION

For the reasons set forth herein, the decision of the U.S. Court of Appeals for the Ninth Circuit should be reversed.

Dated: November 10, 1984

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